United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

No. 74-2431

B

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

p/s

No. 74-2431

CIVIL AERONAUTICS BOARD,

Appellee,

v.

CAREFREE TRAVEL, INC., VACATION VENTURES, INC., and DORAN JACOBS;

SURREY INTERNATIONAL TRAVEL, INC., ESTHER ZETLIN and JACK GORCEY;

ERNIE PIKE ASSOCIATES, LTD., ERNIE PIKE and HENRY ZETLIN,

Appellants.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR APPELLANTS

HOWARD S. BOROS
MARK PESTRONK

BOROS & GAROFALO, P.C.
1120 Connecticut Avenue, N.W.
Suite 460
Washington, D.C. 20036
202/296-3766

Attorneys for Appellants

December 13, 1974

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF CITATIONS

COURT CASES

SUPREME COURT CASES:

U.S. COURT OF APPEALS CASES:

Page

ADMINISTRATIVE CASES

STATUTES

CIVIL AERONAUTICS BOARD REGULATIONS

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-2431

CIVIL AERONAUTICS BOARD,

Appellee,

v.

CAREFREE TRAVEL, INC., VACATION VENTURES, INC., and DORAN JACOBS;

SURREY INTERNATIONAL TRAVEL, INC., ESTHER ZETLIN and JACK GORCEY;

ERNIE PIKE ASSOCIATES, LTD., ERNIE PIKE and HENRY ZETLIN,

Appellants.

On Appeal from the United States District Court for the Eastern District of New York

---

BRIEF FOR APPELLANTS

STATEMENT OF ISSUES

A. Do the affinity charter regulations violate the equal protection doctrine imbedded in the due process clause of the Fifth Amendment?

B. Do the affinity charter regulations violate the anti-discrimination provisions of the Federal Aviation Act of 1958?

C. Do the affinity charter regulations apply to Appellants?

D. Is the preliminary injunction so vague, impractical, and burdensome as to render it invalid?

E. Have the standards for preliminary injunctive relief been met in this case?

F. Is the preliminary injunction supported by substantial evidence?

G. Were Appellants denied their right to a hearing before a federal judge by the district court's referral of the evidentiary hearings to a U.S. magistrate?

H. Were Appellants prejudiced by the Civil Aeronautics Board's joinder of thirty-three different defendants in the same action?

I. Were Appellants prejudiced by the non-random selection of the district judge?

PRELIMINARY STATEMENT

This is an appeal from a case decided in the United States District Court for the Eastern District of New York by Judge Orrin G. Judd. Case No. 74 C 915. The decision has not yet been reported.

STATEMENT OF THE CASE

On June 19, 1974 the Civil Aeronautics Board filed a Complaint and applied for an Order to Show Cause in the Eastern District of New York requesting preliminary and permanent injunctions against nineteen individuals and fourteen companies engaged in various aspects of the travel industry. The moving papers alleged that Appellants were violating Sections 401 and 402 of the Federal Aviation Act of 1958[1] and certain regulations of the Civil Aeronautics Board (14 C.F.R. §§ 207, 208, 212, and 214).[2]

The substance of the Complaint was contained in two Counts. Count One alleged that Appellants were engaged in

---

[1] 49 U.S.C. §§ 1371, 1372.

[2] App. 2a *et seq.*

indirect air transportation without authority from the Civil Aeronautics Board in violation of Sections 401 and 402, which require as a prerequisite to such activity that a certificate of public convenience and necessity or a foreign air carrier permit be issued. Count Two alleged that Appellants were buying and selling air charter transportation for their own account, selling air transportation at prices fixed by them for affinity charter flights, selling and advertising such charter transportation to the general public, failing to prorate the charter costs amongst the participants, failing to provide participants with a proper statement of the costs and expenses involved in said affinity charters, and intermingling roundtrip passengers with one-way passengers. The Civil Aeronautics Board maintained that the foregoing activities and/or omissions violated its charter regulations.

The case was assigned to Judge Orrin Judd, but not by "random selection" as prescribed by Rule 2 of the Individual Assignment and Calendar Rules of the United States District Court, Eastern District of New York. It was assigned to Judge Judd under Rule 3 on Plaintiff's allegation that this case was "related" to *CAB* v. *Aeromatic et al.*, 489 F. 2d. 251 (2d. Cir. 1973), which had been remanded by this Court for trial on the merits and assigned to Judge Judd. Despite defendants' request, Judge Judd did not return the case for re-assignment pursuant to local Rule 2(d).

In pretrial motions, Appellants alleged:

(1) that the improper misjoinder of defendants having no common affinity was a violation of Rule 20(a) of the Federal Rules of Civil Procedure and contravened this Court's decision in *Nassau County Association of Insurance Agents* v. *Aetna Life and Casualty Company*, 497 F. 2d. 1151 (2d. Cir. 1974) and, accordingly, that the case should be dismissed or in the alternative severed;

(2) that the case should be dismissed for nonjoinder of airlines, hotel owners, travel agents and charter groups that would be directly affected by an injunction; and

(3) that the case should be dismissed or summary judgment be granted defendants because there were no violations of Section 401 of the Federal Aviation Act or any of the Board's rules and regulations applicable to defendants. All of these motions were denied.

As the proceedings commenced, Judge Judd decided that the affidavits accompanying Plaintiff's motion for a preliminary injunction were insufficient to warrant the requested relief. He directed that oral testimony be given and, after hearing the direct testimony and a portion of the cross examination of one witness, assigned the case to Magistrate Catoggio, as Special Master, to hear further evidence and to make recommendations thereon to the Court (J.A. 1).

During the pendency of the proceedings before Magistrate Catoggio, a number of defendants settled their cases either by consent decrees or by default judgments.[3]

As to the remaining defendants, Magistrate Catoggio recommended that no preliminary injunction be issued because no evidence had been submitted to support the conclusion that any of the surviving defendants had "personally, presently and systematically" violated CAB rules, regulations, or the relevant statute (J.A. 19).

The Court issued its Opinion on September 30, 1974, which stated that the Court proposed to issue a narrow injunction (J.A. 27 *et seq.*). Plaintiff was requested to draft an appropriate decree. That draft was far more extensive than was suggested by the Court's opinion. Nevertheless, with relatively minor amendments, it was adopted by the Court. The final amended preliminary injunction was entered on October 15, 1974 (J.A. 85).

Appellants Carefree Travel, Inc., Ernie Pike Associates, Ltd., Surrey International Travel, Inc., and the individuals employed by those companies requested a stay of the pre-

---

[3] Defendants Scottish-American Association, Inc., Travel-A-Go Go, Inc., Francis John Folan, Frankie Ross, Julia Ann Folan, Turkish American Mediterranean Association, Inc., Sahir Tarhan, Orhan Erenler, Yilmaz Erim, Ata Erim, Turkish American Association for Cultural Exchange, Faruk Fenich, The Professional & Alumni Association, Inc., Frank Latorre, Frank S. Lator, German Overseas Tours, Inc.

liminary injunction of the District Court to afford them an opportunity to pursue an appeal and stay in this Court. The District Court granted a stay of paragraph 4 of its order until October 25, 1974 and extended same until October 29, 1974 so that this Court could entertain Appellants' motion for a stay pending disposition of the appeal.

On November 6, 1974, this Court issued the requested stay. Plaintiff's petition for rehearing of that order was denied on December 2, 1974.

SUMMARY OF ARGUMENT

From the outset the District Court perceived that there was something awry in the affinity charter industry. Perhaps this impression arose from the Judge's participation in the earlier *CAB* v. *Aeromatic, supra.* Perhaps his concern arose from the government's allegation that there was a thriving black market in charter transportation and that it was necessary to join thirty-three appellants to prove it. In any event, the District Court was determined to right the situation by any means available.

The means employed were erroneous because the Court misdiagnosed the maladies in the affinity charter industry. There is no evil in the public's seeking low-cost charter transportation on a non-discriminatory basis, nor can Appellants be held reprehensible in making such transportation available. But the Civil Aeronautics Board would have it otherwise.

The Civil Aeronautics Board has developed a set of so-called affinity charter regulations[4] which discriminate against those segments of the public which do not belong to organizations large enough to charter aircraft on an economical basis. The discrimination is unrelated to any transportation purpose and consequently is inconsistent with the proscriptions of both the Fifth Amendment of the United States Constitution and Section 404(b) of the Federal Aviation Act of 1958.[5] Appellants should not and cannot be required to observe unlawful regulations.

---

[4] App. 2a *et seq.*

[5] App. 2a.

Moreover, the Board has observed that its affinity charter regulations are so complex and inconsistent with the travel aspirations of the American public that they are unenforceable. Its Bureau of Enforcement has stated that of the affinity charter flights investigated at least 47% carried persons ineligible to use this type of transportation. In short, restrictive affinity charter rules are akin to the Volstead Act in terms of their enforceability.

Even if the affinity charter rules were lawful and enforceable, they cannot be impressed against these Appellants because those rules by their terms are not applicable to them. Despite that fact, which is conceded by the Government, the District Court found that Appellants should be made subject to them. It went even further and applied the regulations to persons whom the Board had previously de-regulated. This is not adjudication; it is legislation.

The terms of the injunction are also oppressive. They require Appellants to assume responsibility for the conduct of other persons over whom they have no control. Furthermore, the language is so vague that Appellants cannot divine how to comply. Finally, the scope of the injunction is so compendious that it is simply unfair.

In any event, no form of preliminary injunction is warranted on this record. The harm to the Appellants far outweighs any injury to Plaintiff. The public interest would be severely prejudiced by a preliminary injuncton. Finally, in light of the sparse evidence produced by Plaintiff and the above-mentioned considerations, Plaintiff will probably lose on the merits.

From a procedural standpoint, this record is fraught with error. First, Plaintiff intentionally misjoined fourteen separate companies and nineteen individuals. None of the companies did business in concert with any of the others. None of the transactions were the same. The sole purpose of the misjoinder was to demonstrate widespread charter violations, thereby prejudicing individual Appellants. Second, Plaintiff selected the District Court Judge out of the normal order by alleging that this case was related to *CAB* v. *Aeromatic, supra.* It is not related. But the cumu-

lative effect of that case and the instant one may have colored the Judge's disposition. Third, after refusing to return this case to the "wheel" for random selection, the District Court Judge referred the bulk of the evidentiary hearings to a U.S. magistrate in violation of Appellants' right to a hearing before a district court judge.

This Court must also recognize that as a practical matter it is not dealing with a "preliminary injunction." Should Appellants be compelled to observe the terms of that decree, their businesses would be destroyed long before they have had an opportunity to be heard on a permanent injunction. That is not equity—it is a Draconian application of governmental power.

ARGUMENT

I.

THE SUBSTANTIVE ISSUES

A. THE BOARD'S REGULATIONS VIOLATE THE "EQUAL PROTECTION" DOCTRINE IMBEDDED IN THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

1. The Affinity Charter Regulations Are Discriminatory.

The regulations at issue are Parts 207, 208, 212, and 214 of the Board's economic regulations.[6] These regulations govern the performance of the principal means of charter air transportation available in the United States.

The particular type of charter at issue here is the so-called "affinity" charter. Although the word "affinity" does not appear in the regulations, it is a generally accepted term for describing the type of charter whose eligibility requirements are unrelated to any transportation consideration. Thus, the following types of organizations, entities, or groups—and only these types—qualify for affinity charter transportation:

1. A club or organization not organized for travel purposes which is so constituted that it is not considered to be comprised of members of the general public.

---

[6] 14 C.F.R., §§ 207, 208, 212, 214. These regulations are substantially similar; they govern the rules applicable to charters operated by U.S. scheduled air carriers, U.S. supplemental air carriers, foreign scheduled air carriers and foreign charter carriers, respectively. See App. 2a *et seq.*

2. Students and employees of a single school.

3. Employees of a single government agency, industrial plant or mercantile establishment.

Members of charter clubs or organizations must have belonged thereto for at least six months prior to the scheduled departure of the charter. This requirement is not imposed upon the other eligible entities and groups. All charterers must hire at least forty seats on an aircraft irrespective of the size or capability of the organization to fill that quota.

The CAB's records reveal that between seventy and eighty percent of all charters operated in 1973 consisted of the affinity variety. The other forms of charter, i.e., the non-discriminatory varieties available to the public at large, are relatively unpopular because they cost more than affinity charters and incorporate burdensome travel restrictions.[7]

In short, the Civil Aeronautics Board has preferred those elite groups which it considers worthy of having access to the lowest cost form of air transportation. Appellants are charged with being more egalitarian in their activities by allowing ordinary citizens to participate in affinity charters. The inherently discriminatory nature of affinity charters is self-evident: they accord a particular classification of traffic a preference because of its identity or status.

2. The Classification Violates The Fifth Amendment.

The classification which limits the availability of affinity charters to selected groups violates the standards of the Fifth Amendment as expressed by the Supreme Court. So-called traditional equal protection analysis requires that "a classification must be reasonable not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Eisenstadt* v. *Baird,* 405 U.S. 438, 447 (1972); *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920); *Lindsley* v.

---

[7] These restrictions are discussed on page 14 *infra.*

Natural Carbonic Gas Co., 220 U.S. 61, 71 (1911). The Board's affinity regulations cannot meet this test.

The equal protection clause of the Fourteenth Amendment is applicable to the Federal Government through the medium of the Fifth. *Bolling* v. *Sharpe*, 347 U.S. 407 (1954). Thus, a federal agency's regulations are subject to "equal protection" analysis. *Moreno* v. *U.S. Department of Agriculture*, 345 F. Supp. 310 (D.C. D.C., 1973).

a. The Traditional Test

The traditional application of equal protection doctrine has been reaffirmed in two recent cases which are analogous to the one at bar: *Moreno* v. *U.S. Department of Agriculture*, 345 F. Supp. 310 (D.C. D.C. 1972), and *Harrell* v. *Tobriner*, 279 F. Supp. 22 (D.C. D.C. 1967). In *Moreno*, the Secretary of Agriculture promulgated regulations under the Food Stamp Act which limited eligibility for food stamps to certain classifications of people. Under the regulations, an eligible household must have been composed of members who were all related to each other. In holding these regulations violative of the equal protection doctrine embodied in the Fifth Amendment, the Court looked to the purposes and objectives of the Food Stamp Act. They were: (1) to improve agricultural economy, and (2) to alleviate malnutrition. On the other hand, the regulations were designed to enforce the conventional morality against communal living. The Court found that the regulations were unrelated to the purposes of the statute. 345 F. Supp. at 313.

In *Harrell* v. *Tobriner*, *supra*, a District of Columbia statute required a one-year residency for eligibility for welfare benefits. The class of persons who had not been living within the jurisdiction for the required year were discriminated against vis-a-vis long-term residents. The three-judge district court found that the purpose of the welfare statute was to preserve the family unit and to promote self-sufficiency and self-help. The purpose of the residency requirements—to prevent rapid influxes of people seeking welfare—was held totally at odds with the statute's

primary purpose of conferring those benefits and, hence, inconsistent with the Fifth Amendment.

The courts have distinguished between the reasonableness of classifications made by the legislature, on one hand, and those delegated the power to make classifications, on the other. *North American Van Lines, Inc.*, v. *U.S.*, 169 F. Supp. 252 (1959):

> "When the legislature delegates to the executive the authority to make generalizations or classifications, that authority is not as broad as the power of the legislature itself. Legislative classification need only withstand the test of constitutionality. But classification by the executive, under delegated authority should be consistent with the intent of the legislature." 169 F. Supp. at 255.

Analogously, under traditional equal protection analysis, a reviewing court will invalidate regulations by a regulatory agency which establish personal classifications having no reasonable relationship to the purposes of the authorizing statute. That is the case here.

The authorizing statute with which we are here concerned is the Federal Aviation Act of 1958 [8] and its predecessor the Civil Aeronautics Act of 1938. These statutes were modeled on the Interstate Commerce Act. *Hawaiian Common Fares Case,* 37 C.A.B. 269, 273 (1962); *Capital Group Student Fare Case,* 25 C.A.B. 280, 286 (1957). Therefore, the judicial precedents relating to the Interstate Commerce Act are equally applicable to the Civil Aeronautics Act and the Federal Aviation Act.

The Supreme Court set forth the fundamental objective of the Interstate Commerce Act as follows:

> "We have repeatedly said that it is apparent from the legislative history of the Act that not only was the evil of discrimination the principal thing aimed at, but that there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate commerce which it had authority to reach. *The Shreveport Case,* 234 U.S. 342, 356, 34 S. Ct. 833, 888, 58 L. Ed. 1341; *Louisville*

[8] 49 U.S.C. § 1301 *et seq.*

> *and Nashville R.R. Co.* v. *U.S.*, 282 U.S. 740, 749, 750, 51 S. Ct. 505, 509, 75 L. Ed. 1227; Paragraph 1 of Section 3 of the Act says explicitly that it shall be unlawful for any common carrier subject to the Act 'to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.'" *Mitchell* v. *U.S.*, 313 U.S. 80, 94-95 (1941).

The overriding purpose of the Federal Aviation Act in forbidding unjust discrimination is contained in Section 102(c)[9] which pinpoints the proscriptions against unjust discrimination with particularity:

> "In the exercise and performance of its powers and duties under this Act, the Board shall consider . . . (c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, *without unjust discriminations,* undue preferences or advantages, or unfair or destructive competitive practices." (Emphasis supplied.)

Accordingly, it was the great purpose of both statutes to compel carriers as public agents to give equal treatment to all.

In stark contrast, *the affinity regulations serve only to promote unjust discrimination.* Under these circumstances it can scarcely be maintained that the affinity regulations promulgated by the Board are pursuant to the purposes of the statute.

The foregoing should demonstrate beyond cavil that the Board's affinity regulations do not meet the traditional test of equal protection and thus must be struck down as unconstitutional.

b. The Arbitrary Classification By The Civil Aeronautics Board Of Those Eligible For Affinity Charter Transtation Is Per Se *A Violation Of Equal Protection.*

Where the C.A.B. undertakes to classify persons entitled to rate preferences on the basis of criteria which are unrelated to a legitimate air transportation purpose, that classification violates the Fifth Amendment. Under the

---

[9] 49 U.S.C. § 1302(c). App. 1a.

"traditional" doctrine discussed earlier, a classification which achieves a Congressional purpose may be permissible although that classification may also be discriminatory—presuming, of course, that the statutory purpose is constitutional. But the doctrine of equal protection is somewhat broader. As was stated in *U.S.* v. *City of Jackson*, 318 F. 2d. 1 (5th Cir. 1963):

> "In a recent study of civil rights in transportation, the author observed, 'Of particular interest was the use of the Fourteenth Amendment precedents, [in *Mitchell*] thus in effect linking the meaning of section 3(1)'s 'undue or unreasonable prejudice' phrase with the meaning of the equal protection clause'. [Footnote omitted]
>
> "Thus, state imposed racial discrimination offending the Fourteenth Amendment, even before liquidation of the separate-but-equal doctrine, is equated with 'unjust discrimination' within the meaning of sections 3(1) and 316(d) of the Interstate Commerce Act." (*Id.* at 12.)

Clearly, although the equal protection clause may earn greater protection than the anti-discrimination provisions of the Federal Aviation Act of 1958, those anti-discrimination provisions cannot sanction greater discrimination than is permitted under the Constitution. In short, "unjust discrimination" under Section 404(b) of the Federal Aviation Act [10] must be at least equated with the equal protection safeties guaranteed by the Fifth Amendment.

The Civil Aeronautics Board has virtually conceded that the classifications which are accorded admission to affinity charter transportation are not a "reasonable" classification in terms of Section 404(b).[11] The "virtual" aspects of its concession is self-serving. But for all intents and purposes, it would be fair to state that this agency agrees that affinity charters are unlawful. Indeed, on several occasions the Board has proposed to eliminate them.[12]

---

[10] App. 2a.

[11] The Board's views are set out on pages 17-18 *infra*.

[12] *Ibid.*

It does not require any logical explanation to conclude that "unjust discrimination" under the Federal Aviation Act of 1958 is also a denial of equal protection under the Fifth Amendment. That is Appellants' contention, which was presented *in extenso* to the Court below.

The District Court treated these contentions rather cavalierly. It avoided the issue of whether affinity charters were unjustly discriminatory under the statute or violative of the Constitution. It concluded that whatever discrimination might exist was required to distinguish individually ticketed transportation from charters. It also opined that whatever discrimination existed under affinity charters was *de minimis* because the Civil Aeronautics Board was undertaking to eliminate this discrimination by authorizing a different form of charter know as travel group charter. The Court erred in both instances.

To be sure, the Board is charged with the responsibility of distinguishing between individually ticketed service and charter air transportation. But it is not empowered to make such distinction in a manner which unjustly discriminates against the traveling public. Moreover, the Board has demonstrated its capability of regulating charters in a non-discriminatory fashion. It has promulgated rules providing for inclusive tour charters and travel group charters which offer the public low-cost transportation. The availability of these charters is not geared to the status of the passenger or to non-transportation-related circumstances. These regulations treat the public in an even-handed fashion and are clearly reasonable. By contrast, the affinity regulations, on the basis of non-transportation-related criteria, exclude persons from advantaging themselves of affinity charters. Consequently, the affinity regulations are arbitrary and capricious, reflecting the Board's notions of social policy as to which segments of the United States public should receive preferential treatment in obtaining low-cost air transportation. The Board has no power to make social policy.

The District Court's contention that the discriminatory nature of affinity charters was cured by the promulgation of travel group charter rules is both legally and factually

erroneous. To contend that because one form of available public transportation is not discriminatory merely because another non-discriminatory form is available conjures up *Brown* v. *Board of Education of Topeka, Shawnee County, Kansas,* 349 U.S. 294 (1954). There, it was contended that school children did not suffer prohibited discrimination from being denied access to segregated schools because other schools were available to them. The Supreme Court found this contention unacceptable as did all courts that handled similar discrimination situations subsequently.

Here, that same contention is no more acceptable. Whereas the charters available to the general public may be "separate" from the discriminatory affinity charters, they are certainly not "equal". The District Court failed to note that the non-discriminatory travel group charters are markedly different from affinity charters in that the former (1) are higher priced; (2) involved cancellation fees of 25% of the total charter price to the passengers; (3) impose minimum stay requirements; (4) require roundtrip passage; (5) require a 25% advance deposit upon subscription and total payment at least 60 days in advance of departure; (6) if an 80% load factor is not achieved, require the flight to be cancelled. The attractiveness of travel group charters to the public is evidenced by the fact that approximately 1% of all charters performed in 1973 were of this variety. In any event, how can this type of unusable, albeit non-discriminatory, charter be regarded as the equivalent of an affinity charter?

The affinity charter regulations present a pristine example of "separate" not being "equal". Were the non-discriminatory forms of travel group charters equivalent in their utility and economic value to affinity charters, the former would disappear and the latter would prevail. Experience has demonstrated the reverse.

B. THE BOARD'S REGULATIONS VIOLATE THE ANTI-DISCRIMINATION PROVISIONS OF THE FEDERAL AVIATION ACT OF 1958.

The Court below sanctioned charter discrimination on the ground that it was necessary to preserve the distinction between charter service and individually ticketed scheduled

transportation. (J.A. 79-80.) To be sure, the latter distinction should be preserved—but it cannot be preserved in a maner inconsistent with the anti-discrimination provisions of the Federal Aviation Act of 1958.

Since 1957 the Board has declared that such a preference is "unjustly discriminatory" within the meaning of Section 404(b) of the Act.[13] Thus, in *Capital Group Student Fares*, 25 C.A.B. 280 (1957), the Board rejected a tariff which proposed reduced fares for students. It did likewise whenever a special interest group requested reduced-rate transportation based upon its status. *Free and Reduced Transportation Case*, 14 C.A.B. 481 (1951); *Group Excursion Fares Case*, 25 C.A.B. 46 (1957); *Capital Group Student Fares*, 25 C.A.B. 280 (1957); *International Air Freight Forwarder Investigation*, 27 C.A.B. 658, 664 (1958); *In The Matter of an A.T.C.A. Resolution*, Order E-14349, August 17, 1959; *American Airlines Reduced Fare for Former Employees*, Order E-19311, January 19, 1963; *Frontier Teachers Tariff*, Orders E-19620, May 28, 1963, and E-19793, July 10, 1963; *Petition of A.S.T.A.*, Order E-20120, October 14, 1963; *American Airlines Reduced Fare for United Nations Employees*, Order E-19519, April 23, 1965; *United Airlines Reduced Fare for School Children*, Order E-21667, January 2, 1965; *Ozark Air Lines Senior Citizen Excursion Tariff*, Order E-21973, March 31, 1965; *TWA Exemption Application*, Order E-22395, June 29, 1965; *Trans Caribbean Airways Individual Senior Citizen Excursion Tariff Revisions*, Order E-23669, May 12, 1966.

For a short period of time the Board faltered in its application of the rule of equality, for example, when it permitted family fare and youth fare discounts to prevail. However, in the *Domestic Passenger Fare Investigation*, Order 72-12-18, December 5, 1972, it cured this aberration. There, it held with respect to youth and family fares:

> "These fares are available only to limited classes of persons, in the one defined by age, and in the other

---

[13] 49 U.S.C. 1374(b). The section is reproduced at App. 2a.

> defined by social relationships. They are therefore *prima facie* discriminatory [footnote omitted] and the question raised is whether discriminations can be justified on a ground of which we legally may take cognizance. (*Id.* at 61).
>
> * * * * * * *
>
> ". . . the range of factors which the Board may consider in the justification of a discriminatory fare is circumscribed. As the Court of Appeals put it, the justification 'is limited to those factors which Congress has by statute deemed material, and those factors which regulatory practice in the transportation industry has, through experience, found relevant.' Thus, factors related to the status of the traffic and unrelated to transportation may not be considered in justification of a discriminatory fare, nor are we empowered to take into consideration matters involving broad social policies, such as special treatment for any particular age group, or encouragement to families as a favored social grouping, whatever our personal views may be on such policies." (*Id.* at 63).

The Board found both youth fares and family fares unjustly discriminatory as they offered discounts on the basis of factors wholly unrelated to transportation.

In this context, let us turn to consideration of affinity charter transportation. The sole advantage of such transportation to the user is that it offers him a lower fare than would otherwise be available if he were to travel on individually ticketed service. However, he is entitled to affinity charter transportation only if he belongs to such favored groups as the Board considers charterworthy, *e.g.*, religious organizations, universities, etc. Also, employees of companies large enough to mount a charter program are entitled to the benefits of same, although employees of small companies unable to do likewise are deprived of that opportunity.

Are the criteria for charterworthiness under the Board's regulations transportation-related? No more so than age, family relationship or status. Hence, the rate preferences

accorded those classifications of traffic preferred by the Board must be deemed unjustly discriminatory.

The Board has not been blind to the frailty of its affinity rules. Yet, it has permitted their discriminatory character to pervade the entire charter industry even while seeking a more even-handed solution to the public's need for low cost transportation. In 1972, it promulgated Part 372(a) of its special regulations wherein it proposed a new type of charter, *i.e.*, the travel group charter. In connection with that proposal, it observed as follows:

> "The proposals stem from . . . the Board's growing concern that our existing rules, limiting charter travel to groups having a 'prior affinity' *tended to discriminate* against members of the public who did not belong to qualified organizations with a membership large enough to successfully mount a charter program; and (2) the fact that our existing rules had proven to be extremely difficult to enforce. We recognize that these two factors are closely interrelated, and that the operators of illegal charters have been satisfying an ever-increasing demand for low-cost charter travel by members of the public who simply do not share the kind of 'affinity' required by our existing rules." (SPR-61, September 27, 1972). (emphasis supplied).

Despite its appreciation of the public's need for low-cost charter transportation and the inevitable violations that would occur should affinity charters continue to operate, the Board elected to tolerate affinity charters for an indefinite period. (EDR-237). The reason for permitting a continuation of affinity charters was that the Board was loathe to "unduly disrupt plans already made, or about to be made, for air transportation under our affinity charter rules. . . ." (*Id.* at 7).

Chairman Secor Browne in espousing the new concept of travel group charters stated:

> "No longer is the ability to charter limited to groups whose so-called affinity is based upon purposes unrelated to transportation. True affinity is the willingness to come and go to the same place, at the same

time, with the same people—nothing more." (C.A.B. Release, December 7, 1972).[14]

The Board's recognition of the illegality of its affinity regulations has literally trip-hammered through recent rule-making proposals. In SPDR-33, it stated:

> ". . . the Board has been motivated by the discrimination inherent in the 'prior affinity' concept . . . these concerns as to the inherent failings of the 'prior affinity' concept had been shared for some time by the regulatory authorities of many countries." (*Id.* at 3).

This precise language was repeated in Amendment 5 to Part 372(a) of the Board's Economic Regulations (*Id.* at 3). To cap the Board's interpretations of its own regulations it stated on October 30, 1974:[15]

> "The 'prior affinity' charter rules have long been recognized as unsatisfactory . . .:
>
> 1. They inherently tend to be discriminatory, in that they are lawfully available only to persons who belong to an organization (or are employed by an agency or company) which is large enough to mount a successful charter program. Thus, the availability of the kind of low-cost air transportation provided by charter service comes to depend upon the particular status of the prospective traveler, as determined by factors involving his personal or business life. Yet these factors should clearly be irrelevant to his right, as a member of the general public, to have equal access to all modes of service offered by common carriers, particularly a mode of air travel which is highly economical." (*Id.* at 6)

Despite the many protestations of the Civil Aeronautics Board that its existing rules are discriminatory, such protestations do not legalize them. It cannot hold to account persons who do not observe rules which it concedes are

---

[14] This statement echoed an earlier one by Chairman Browne contained in the C.A.B. Press Release dated April 18, 1972, where he stated "On the one hand, affinity charters are discriminatory. They are available only to those who belong to some pre-existing society or organization. On the other hand, abuses of the affinity concept have been widely publicized."

[15] EDR-237C.

unfair, unworkable and discriminatory to the public. To seek an injunction in this proceeding against persons who do not observe discrimination in transportation is at minimum astonishing. As Locklin stated in the *Economics of Transportation*:[16]

> "Personal discrimination is objectionable for a number of reasons. In the first place, it is inconsistent with the democratic ideals of a society composed of individuals with equal rights and privileges."

The described personal discrimination is compounded by the discrimination inherent in establishing an arbitrary minimum of forty participants per charter. The requirement that a charter be for at least forty seats is not inherently discriminatory if that limitation applies to the general public. However, the superimposition of the forty passenger minimum upon the "affinity" requirements results in a situation whereby General Motors employees have the wherewithall to obtain charter transportation whereas a local bowling league—which otherwise has a greater "affinity" amongst the participants than General Motors employees—may not. Thus, the Board prefers the large organizations over the small; the established organizations over the newly organized ones.[17]

The Board should be held accountable for fostering unjust discrimination. Appellants should not be penalized for the Board's derelictions.

C. THE BOARD'S REGULATIONS ARE NOT APPLICABLE TO APPELLANTS.

1. The Regulations Are Not By Their Terms Applicable To Appellants.

The language of the regulations specifically excludes Appellants from responsibility thereunder. The Plaintiff below conceded that Parts 207, 208, 212 and 214[18] do not "by

---

[16] 3d. Ed. at 484.

[17] Note the six-month prior membership requirement for affinity charters.

[18] App. 2a *et seq.*

their terms" apply to Appellants.[19] The Court below did likewise.[20] They scarcely could do otherwise as the language of the regulations is unequivocal:

> "Section 207.2 *Applicability of Part.* This part shall apply to all air carriers other than Alaskan air carriers and air carriers certified for supplemental air service who hold currently effective certificates of public convenience and necessity issued by the Board pursuant to Section 401 of the Act."

Nevertheless, the Court held as follows:

> "However, if the contract between an airline and a chartering organization is subject to specific regulations, a defendant who takes part in conduct which violates those regulations should not be permitted to claim immunity from injunctive relief just because he does not have a license as an air carrier."[21]

Should an Appellant act in concert with a person subject to the regulations, of course, the former should be subject to the same injunction as the carrier involved. (Ironically, no air carrier was brought before the bar.) However, no scintilla of evidence was produced to even suggest that movants were acting in concert with air carriers. Accordingly, the District Court in essence enacted a new CAB regulation by issuing an injunction requiring Appellants to assume responsibility to carry out regulations which are not applicable to them. It is the function of the CAB—not the District Court—to enact rules.

In this latter connection, it is noteworthy that the Chief of the Bureau of Enforcement of the CAB testified:

> "[It is] the carrier's responsibility for assuring itself that these charters are being conducted in accordance with the Board's Regulations. . . . In my view we should exhaust the ability of the carriers to fulfill their responsibilities before we attempt to solve this problem by concluding that they are unequal to it." (Tr. Aug. 12, pp. 560-562.)

---

[19] J.A. 61.

[20] J.A. 61.

[21] J.A. 61-62.

Of particular significance is the fact that these statements were made in the context of whether travel agents rather than air carriers should assure the *bona fides* of charters.

Let us now evaluate the specific rules at issue and the responsibilities of the various entities regulated by those rules. The only rules applicable to "travel agents" such as Surrey are Parts 207.30 and 207.31.[22] These rules (1) prohibit a travel agent from receiving a commission from both the direct air carrier and the charterer for the same service; and (2) require a travel agent to execute a portion of the "Statement of Supporting Information." The Statement of Supporting Information to be executed by the travel agents states that:

> "I have acted with regard to this charter . . . in a manner consistent with Part 207 of the Board's economic regulations." [22a]

Similar warranties are required of the air carrier and the chartering organizations. However, in the case of the air carrier, it also assumes responsibility for the warranties of the chartering organization and the travel agent.[23] Thus, it must be concluded that the warranty of the travel agent extends only to the conduct prohibited and required by Parts 207.30 and 207.31.

The District Court injunctive decree effectively makes the travel agents and "intermediaries" guarantors of *all* provisions in Part 207. This part contains 41 separate sections relating to matters such as air carrier tariffs, permissible methods of charter solicitation, restrictions on frequency and regularity of charters by air carriers, substitute transportation in emergencies, air carrier responsibility to identify charter participants, etc. It is inconceivable that a travel agent or "intermediary" was intended to be governed by these provisions. Yet the injunction issued by the District Court has that effect.[24]

---

22 App. 5a. Comparable provisions are contained in Parts 208, 212 and 214.

22a App. 89 *et seq.*

23 Part 207.60.

24 J.A. 89.

Even the advertising limitations imposed by Part 207.40 and 207.44[25] are by their terms applicable only to "chartering organizations." Nevertheless, the District Court imposed those limitations on Appellants.[26]

2. Legislative And Regulatory History Demonstrate That The Board Did Not Intend To Control The Activities Of Travel Agents Other Than With Respect To Double Compensation.

As noted earlier the only regulatory control over travel agents engaged in the charter industry is to prohibit double compensation. This is not to suggest that the Civil Aeronautics Board could not have developed regulations governing all their activities. It simply has not done so and may not now complain of its own failure.

Prior to 1955 the Civil Aeronautics Board did not have jurisdiction over travel agents. However, its experience indicated that control over travel agent activities could be useful to prevent certain unsavory activities by that segment of the air travel industry. Thus it sought and obtained authority over ticket agents.[27]

Pursuant to this authority, the Board has issued Part 399.80 which defines "unfair and deceptive practices" by such agents.[28] It could have promulgated more extensive regulations. It did not because, at least in the area of charters, it sought to impose responsibility for enforcement of the regulations upon direct air carriers only.

By regulating travel agents in this fashion, the Board patently did not intend to subject them to the entire scope of the charter regulations. This interpretation is supported by *Flood* v. *Kuhn,* 407 U.S. 258 (1972). There, an antitrust action was brought against the commissioner of baseball on the ground that the "reserve clause" was a violation of such laws. Finding for defendant, the Court held that the antitrust laws were not applicable to professional baseball.

---

25 App. 5a.

26 J.A. 86-87.

27 Section 101(35) of the Federal Aviation Act of 1958 as amended; 49 U.S.C. § 1301(35).

28 14 C.F.R. § 399.80.

The rationale was that Congress, since *Federal Baseball Club* v. *National League,* 259 U.S. 200 (1922), and *Toolson* v. *New York Yankees, Inc.,* 346 U.S. 356, (1953), had not abolished the court-approved exemption from the antitrust laws. The Court concluded that ". . . Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes." (*Id.* at 285). That case is parallel with the instant one. However, this case is far stronger because, as will be shown below, the Civil Aeronautics Board has taken positive steps to de-regulate travel agents and "intermediaries."

3. The Board Rejected The Joint And Several Liability Of Travel Agents And Intermediaries.

The first comprehensive statement of rules governing charters was contained in the 1955 *Transatlantic Charter Policy* (Order E-9221, May 20, 1955). There, the Board imposed requirements upon the charter carrier, the charterer ". . . and all intermediary organizations involved in the proposed charter. . . ."[29] The "Application" for authority to operate a charter included a requirement that certain warranties and representations be made. The prefatory language stated:

> "The carrier, the charterer and all intermediary organizations involved in the proposed charter *jointly and severally,* represent and warrant as follows . . ." (Emphasis supplied.)

Thus, when charters were brought under the regulatory umbrella, the Board required all parties to warrant or "assure" the conduct of others. However, by 1959 the Board—with the benefit of its experience—amended its 1955 transatlantic charter policy. The Statement of Supporting Information was sectionalized and the provisions applicable to the charterer, the agent and the carrier were separately stated. *Each warranted its own performance only, with the exception of the air carrier which remains responsible for the conduct of the charterer and the agent. Of particular significance is the Board's de-regulation of*

---

[29] At that time Parts 208, 212 and 214 did not exist.

the "intermediaries" which it had regulated in 1955. No mention of "intermediaries" is contained in the 1959 Rules.

When Parts 207, 208, 212 and 214[30] were amended in the 1960's, the language of the 1959 regulations was adopted verbatim, and so it has remained—at least with respect to the warranties. Clearly, the Board had earlier asserted jurisdiction over "intermediaries" and had assessed joint and several liability on both travel agents and intermediaries. It is equally clear that the Board subsequently rejected these regulatory devices.

Indeed, as recently as November 21, 1974 (Order 74-11-122) the Board rejected petitions requesting that travel agents be made primarily liable for enforcing the charter regulations. This Court requires no clearer expression of the Board's regulatory intent.

The injunction would reinstitute regulatory control over intermediaries and revive the concept of joint and several liability. That is the task for the Board, not for the District Court.

D. THE PRELIMINARY INJUNCTION IS VAGUE, IMPRACTICAL OF IMPLEMENTATION, AND UNDULY BURDENSOME.

Elsewhere it has been contended that no injunction in any form should have been issued by the District Court. But, assuming, *arguendo,* that an injunction is appropriate under the premises, the existing form is entirely inappropriate.

Paragraph 2 thereof requires that Appellants assure ". . . that the contents of such solicitation material [material utilized to attract affinity charter passengers] is not used in any manner to solicit individuals (through personal contact, through advertising or otherwise) as distinguished from the solicitation of an organization for a charter trip, except after a charter contract has been signed with a direct air carrier." (J.A. 87) This proviso is objectionable, first, because no scintilla of evidence was produced that passengers were solicited for a charter prior to execution of a charter contract. To enjoin conduct which

---

[30] Part 208 was promulgated in 1962; Part 214 was promulgated in 1966.

has not taken place, and which is not likely to take place, is inequitable.

Second, how can one who prepares advertising material guarantee that no one else will use such material to solicit individuals as distinguished from the organization itself? Such a requirement entails a guarantee by the person preparing the advertising of the conduct of all persons known and unknown. This reality illustrates the rare wisdom of the Board in imposing advertising restraints upon chartering organizations themselves, rather than other persons. The charterer is obviously in the best position to know if a charter contract has been executed and may then determine that the membership has been legitimately solicited under the rules.

Third, the language of Paragraph 2(c) is so vague that it would appear to prohibit conduct expressly authorized by Sections 207.40(d), 208.10(d), 212.40(d), and 214.30(d) of the Economic Regulations.[31] These sections permit advertising to obtain solicitations of interest from organizations' memberships in a specific charter *prior* to execution of a charter contract. Of course, this makes sense, as in the absence of indications of interest, a charterer would be profligate in making financial commitments to an air carrier without knowing whether it had sufficient passengers to cover that commitment. Nevertheless, this type of solicitation may well be prohibited under Paragraph 2 of the injunction.

Paragraph 3 requires Appellants to insure that the charterer *itself* complies precisely in its operation with the advertising material. Thus, the District Court would have Appellants held responsible—under threat of contempt—for the conduct of others over whom they have no control. Such vicarious liability should be imposed upon no one. A person should be responsible only for his own behavior. Fulfillment of that responsibility is in itself difficult given the vague state of the Board's regulations, but here the Court would impose not only guilt by association but also guilt by disassociation.

---

31 App. 5a.

Paragraph 4(a)(ii) requires that all Appellants "assure that the chartering organization has executed and has filed with the direct air carrier Section B of Part II of the Statement of Supporting Information . . . and that . . . as executed, indicates compliance by the charterer with the applicable affinity charter regulations. . . ." (J.A. 88). The Board's rules do not require that the agent of record assure that the chartering organization has done anything. The rules clearly contemplate that the air carrier—and the air carrier only—obtain the Statement of Supporting Information from the charterer. Indeed, should the chartering organization send its statement directly to the carrier, the agent would have no means of knowing whether this obligation has been fulfilled.

Paragraph 4(a)(iii) is also unduly burdensome. It requires that Appellants "assure that any other intermediary acting with respect to such charter has executed the warranty attached hereto as Appendix A." (J.A. 89). How can the agent, from the information contained on the Statement of Supporting Information executed by the charterer, assure that the charter flight will be conducted in accordance with CAB regulations? Can he assure that the carrier has not rebated monies to the charterer? Can he assure that the charterer has confined its solicitation to the members of the organization and its immediate family? Can he assure who are in fact members of the immediate family? Can he assure that the members have held this status for at least six months? Can he assure that the chartering organization has not earned a profit on the air transportation? Can he assure that the chartering organization has prorated the flight? Can he assure that the carrier has executed a charter contract reflecting the prices published in its tariff? The number of impossible assurances that the Court would require of the travel agent seems endless.

Paragraph 5 suffers from several deficiencies. First, the prohibition against ". . . Directly or indirectly participating in the arrangement or sale of affinity charter air transportation . . ." (J.A. 89) is unacceptably vague language

for a preliminary injunction. The word "indirectly" is not susceptible to definition within the four corners of the factual record developed herein. Moreover, the word "affinity" does not appear in either the CAB regulations or the governing statute. Likewise, this adjective has not been demonstrated to be definable. Finally, the clause ". . . knows or has reason to know . . ." is unacceptably vague. Although no objection is made to the actual knowledge criterion, having "reason to know" is an impossible standard. Must Appellants make an independent investigation of the facts to satisfy this standard? How detailed must such an investigation be? In any event, how can it ever be satisfied?

As was the case in Paragraph 4, *supra,* the Court in Paragraph 5 is assessing Appellants with joint and several liability for the derelictions of others. It is entirely inappropriate to require Appellants to guarantee conformance with the regulations by other persons.

The last observation applies with equal force with respect to Paragraph 6. Furthermore, no evidence in this record suggests that Appellants have entered into any contract in violation of any provision of law or the CAB's rules and regulations. Paragraph 6 is wholly gratuitous.

E. THE STANDARDS FOR GRANTING PRELIMINARY INJUNCTIVE RELIEF WERE NOT MET.

Within this Circuit, it has recently been held that:

> "The settled rule is that a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Sonesta Int'l Hotels Corp.* v. *Wellington Associates,* 483 F. 2d. 247, 250 (2d Cir. 1973).

Gresham v. *Chambers,* 501 F. 2d. 687, 691 (1974).

Where the Government is plaintiff a preliminary injunction will not be granted unless the equities are clearly in the plaintiff's favor, and unless the court, in the sound

and careful exercise of its discretion, finds such drastic relief to be necessary. See, *e.g., Hecht Company* v. *Bowles,* 321 U.S. 321 (1944); *Securities and Exchange Commission* v. *Harwyn Industries Corp.,* 326 F. Supp. 943, 955 (S.D.N.Y. 1971); *United States* v. *Gressinger,* 255 F. Supp. 328 (S.D. Fla. 1966).

Indeed, in *United States* v. *Taystee Baking Co.,* 55 F. Supp. 490 (N.D. Tex. 1944), it was held that a court of equity should be *especially hesitant to issue an injunction at the Government's behest.* The court observed (p. 493):

> "Another consideration that impels the court to act with caution and care is the fact that the plaintiff in the case is the government of the United States. Where two litigants are on equal footing and one of them sues out an attachment or writ of injunction and does it wrongfully, so that the defendant is injured, the plaintiff may be required to respond in damages to compensate the injury. But where the government appears, if it injures a defendant by suing out an injunction, there is no recourse in the way of damages, there can be no reconvention in the courts. The government stands behind its robe of sovereignty and may not be sued, as the individual may. Therefore, the greater caution, and the more careful should be the consideration. *Fleming* v. *National Bank,* D.C., 41 F. Supp. 838."

In the instant case, there are at least five reasons why, even if Appellants were liable for violations of the regulations, a preliminary injunction should not have been granted:

1. The Hardship Of The Preliminary Injunction Is Enormous, And Infinitely Exceeds The Damage To Plaintiff Of Denial Of An Injunction.

The courts are particularly reluctant to enforce governmental regulations if such enforcement might put the defendant out of business. In such a case, the defendant's loss would be considered out of proportion to the public interest which the enforcement of the regulations serves, *United States* v. *Gressinger, supra* (denying a preliminary

injunction). Equity will countenance damage to the plaintiff, and deny a preliminary injunction if the issuance thereof would destroy the defendant. *R.F.D. Group Ltd.* v. *Rubber Fabricators, Inc.*, 323 F. Supp. 521, 528 (S.D.N.Y. 1971).

It has been established with respect to all of the Appellants, without contradiction, that a preliminary injunction in the case at bar would be tantamount to a permanent one, and would not only stigmatize and injure the defendants but would drive them out of business. That would result in irreparable damage to Appellants and to the general public. This damage is independent of whether or not Appellants have in fact been violating any of the CAB regulations—and, indeed, there is no evidence that they have.

On the other hand, the injury to the Government by denial of its application would be minimal. Not only has it failed to make out a case but, even if it had substantial evidence of continuing violations, it could obtain relief in a relatively short time, through a permanent injunction, statutory fines, and other means. Nor would the public suffer through the denial of this application; on the contrary, it would benefit. As shown at the hearing, millions of dollars have been expended or committed in the making of land and air reservations. If a preliminary injunction were to issue, Appellants would have to forfeit their large deposits, in addition to suffering other great losses. Moreover, the traveling public would be unable to carry out its vacation plans and would be, in effect, stranded.

2. The Court Will Also Give Serious Consideration To Defendants' Good Faith Efforts To Comply With The Government's Regulatory Scheme.

The testimony was replete with uncontradicted evidence that Appellants had, particularly in the last six months, made special efforts to comply with the letter of the regulations and to prevent even inadvertent infractions. Such efforts have been repeatedly held a ground for denying preliminary injunctions. See *Hecht Company* v. *Bowles, supra* at 325-26; *United States* v. *Gressinger, supra* at 331;

United States v. *Taystee Baking Co., supra* at 492. In *Hecht,* the District Court found that the issuance of an injunction would have "no effect by way of insuring compliance in the future," since efforts had already been made to comply with the appropriate regulations. It therefore dismissed the case. The Court of Appeals accepted the District Court's finding but believed that the law required that an injunction be granted irrespective of the equities. The Supreme Court rejected this interpretation of the law (p. 328), vacated the injunction, and remanded.

3. The Extraordinary Drastic Remedy Of A Preliminary Injunction Is Not Available Where The Infraction Is Minor Or Accidental.

All of the Government's evidence of alleged violations consists of isolated unauthorized sales of tickets to a government investigator, or isolated mistakes with respect to organizations, and all of them are explained in the opposing affidavits. These isolated errors are particularly innocuous and explainable in view of the complexity and ambiguity of the regulatory scheme. As noted above, the CAB itself has admitted that its affinity charter regulations are not only discriminatory but "extremely difficult to perform." It would be both unjust and inequitable for an injunction to issue upon the basis of such inconsequential errors in complying with almost incomprehensible regulations.

4. A Preliminary Injunction Is Not Available To Enforce Regulations Which Are Both Difficult To Interpret And Inherently Unenforceable.

When an administrative agency seeks to enforce a regulatory scheme, a court of equity must consider both the difficulty of interpreting the government regulation (*Hecht* v. *Bowles, supra* at 325) and the ambiguity of the regulatory scheme. *Securities and Exchange Commission* v. *Harwyn Industries Corp., supra* at 943, 956, 957.

Here is a classic example of regulations which are difficult, if not impossible, to enforce. The Board has recognized this reality on many occasions. Thus, on October 30,

1974, it proposed to eliminate affinity charters and made the following observations:

> "The 'prior affinity' rules, as demonstrated by years of actual experience, are also inherently difficult to enforce. The flouting of these rules by passenger consolidators, engaged in the illegal business of selling charter seats for a fixed price to ostensible members of ostensible organizations, has been widespread. Indeed, insofar as the very concept of the rules involves questions of 'bona fide' membership in 'bona fide' organizations, at best they invite paper compliance with the largely artificial 'objective' requirements which the Board has found it necessary to devise in order to overcome the obvious impossibility of determining the actual 'bona fides' of each member of each organization. Thus, for example, certain fraternal organizations—whose bona fides are unquestioned—are known to sponsor elaborate charter programs. Since these programs are a feature prominently mentioned, if not highlighted, in their membership drives, there is no way of knowing how many of their memberships are actually motivated by a desire for the opportunity to enjoy substantial savings in vacation travel rather than by a genuine interest in strengthening fraternal ties. Yet, under our rules, a member is, in effect, conclusively presumed to be 'bona fide' if he joined the organization at least 6 months before the particular charter flight departs." [Footnotes omitted]. EDR-237C, page 7.

5. The Court of Equity Will Also Consider Whether Preliminary Injunctive Relief Will Truly Serve The Public Interest.

The courts have recognized that the mere fact that it is the Government which seeks a preliminary injunction does not necessarily mean that such an injunction is in the public interest. *United States* v. *Taystee Baking Co., supra* at 493. The Government's request may actually be adverse to the public interest. *United States* v. *Martin,* 162 F. Supp. 932, 934 (M. D. N. Car. 1958); *United States* v. *Gressinger, supra* at 332. Here, in fact, the public interest favors the continuation of Appellants' business. *R.F.D. Group Limited* v. *Rubber Fabricators, Inc., supra* at 528; *United States* v. *Gressinger, supra* at 332.

Even where the agency's regulatory scheme may benefit the public, countervailing equitable factors may require denial of the request for preliminary injunctive relief. *Securities and Exchange Commission* v. *Harwyn Industries Corp., supra* at 955; *Hecht Company* v. *Bowles, supra* at 330. Certainly, the public interest here favors the maintenance of the traveling public's plans and commitments, and a preliminary injunction would gravely disrupt them, for no public purpose.

F. THE PRELIMINARY INJUNCTION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Government's counsel stated to the District Court as follows:

> "I am not interested in obtaining an injunction in this case on the basis of a few isolated instances of conduct. I am interested in obtaining an injunction on the basis of regular business practices, long-standing violations of the Federal Aviation Act, and courses of conduct which have been committed for a period of time." (Tr. 350, August 9, 1974).

However, the Government only produced isolated instances of allegedly unlawful conduct. This lead the magistrate who heard the evidence to recommend denial of a preliminary injunction. The District Court, on the basis of the same evidence—which it had not heard—disregarded this recommendation.

Let us review the alleged violations of Appellants.

1. Carefree Travel, Inc., Vacation Ventures, Inc., and Doran Jacobs

Basically, there were two charges against Carefree. First, the CAB's investigator, Mr. Minichiello, bought a ticket from Ms. DeTurris, in Carefree's office (Minichiello aff. ¶ 28). The answering affidavits of Mr. Jacobs and Ms. DeTurris show that Mr. Minichiello used his powers of persuasion to induce an unauthorized employee to violate the instructions of her employer. He led her to believe that he was related to a friend of her husband's, which was not the fact. This was the only individual ticket sold by any of

Carefree's employees for that flight (Jacobs aff. July 17, p. 4).

Second, the supplemental affidavit of Mr. Minichiello sets forth a number of flights which were allegedly taken by improper charter groups. Aside from the fact that it was not Carefree's obligation to verify the authenticity of these groups, the fact, as shown in Mr. Jacobs' affidavit (*Id.* pp. 6-7), in that every one of these flights was actually taken by other, unquestionably legitimate charter groups. The names of the group or groups which actually took each flight were furnished by Carefree to the air carrier before the flight, and each such name is set forth in Mr. Jacobs' affidavit *(Ibid.)*.

As a matter of law, Carefree, as a tour operator, is not subject to the affinity group regulations. However, even apart from that point of law, its alleged infractions of the regulations have been fully explained and, indeed, negatived. They certainly do not warrant a preliminary injunction.

2. Ernie Pike Associates, Ltd., Ernie Pike and Henry Zetlin

The complaint charges Pike Associates with "advertising or otherwise soliciting the sale of affinity charter air transportation to members of the general public" (Complaint ¶ 33c). That allegation is untrue. Pike Associates does not advertise to the general public, either in magazines or in newspapers. Its contacts are exclusively with retail travel agents and with clubs and other qualified affinity groups (Tr. August 5, 34). The circulars or flyers which figure so prominently in the moving affidavits and the direct testimony are prepared solely for distribution to travel agents and members of these affinity groups (Pike aff. July 17, pp. 1-2). In fact, as Mr. Pike testified without contradiction, his company stopped sending out flyers entirely between eight and ten months ago (Tr. July 5, p. 71).

The CAB utterly failed to establish the allegation in paragraph 33b of the complaint that Pike Associates

knowingly sells air transportation to persons other than bona fide members of charterworthy groups and their immediate families. No less than half a dozen times in his direct testimony Mr. Pike expressly denied this allegation. (Tr. Aug. 5, pp. 92-93). (Tr. Aug. 5, p. 93). When Mr. Minichiello, Plaintiff's premier investigator, visited the offices of Pike Associates and attempted to buy a single ticket on a Las Vegas flight, he was turned away by Henry Zetlin (an employee of Pike Associates and a defendant herein) (Tr. Aug. 5, p. 126).

The Court is requested to take special note of the fact that in January, 1974, prior to the institution of this action, Pike Associates inaugurated careful and detailed steps to minimize the possibility that CAB regulations might be violated, even inadvertently, on flights with which it is associated. Mr. Pike testified that at the beginning of this year he and his colleagues became aware of the new policy of the CAB toward the enforcement of its regulations and in an effort to avoid legal difficulties, Pike Associates retained an attorney specializing in CAB matters. Following its attorney's advice, the company undertook to keep much more careful records, instituted checking procedures of its own (See Pike Ex. 2) and added two more administrative employees to its staff, at an approximate additional cost of $30,000 per year (Tr. Aug. 5, pp. 119-22). Thus, the Government's counsel himself admitted: "There is nothing after they began cleaning up their business five or six months ago" (Tr. Aug. 5 p. 41).

This uncontroverted evidence of change in the direction of compliance is highly pertinent. In any request for injunctive relief, particularly of a preliminary nature, the current, not the past, state of facts is controlling.

3. Surrey International Travel, Inc., Esther Zetlin, and Jack Gorcey

The affidavits of Esther Zetlin of July 3 and July 17, 1974 and the testimony of Jack Gorcey before Judge Catoggio on August 5, 1974 contain all the relevant facts. These facts compel the conclusion that Surrey simply does

not belong in this case. Surrey is a retail travel agency, duly appointed by the International Air Transport Association (IATA) and the Air Traffic Conference (ATC) and authorized to issue, as an agent of certificated airlines, tickets to passengers on flights of domestic and foreign carriers (Zetlin aff. July 17, p. 7; Tr. Aug. 5, p. 147).

Plaintiff makes the wholly unsupported charge that "Surrey has retailed individual tickets on illegitimate air charter flights" and that it "has participated, as travel agent of record, in affinity charter flights which did not comport with the Board's regulations" (CAB memorandum June 30, p. 31). There is no evidence, in the moving affidavits or in the oral testimony, that Surrey had any knowledge that any affinity charter flights with which it was in any way associated were "illegitimate."

The only specific charges made against Surrey are found in paragraphs 8 through 11 of the moving affidavit of Paul Wallig, a CAB field representative. These charges have been fully answered by Mrs. Zetlin in her affidavit of July 17. The charter contracts involved in the cases referred to were not prepared by Surrey, nor were they signed by Surrey. The Statements of Supporting Information were signed by the charterer before they were submitted to Surrey. Relying in two instances on the representation of an experienced travel agent, and in the other two upon its general knowledge of the authenticity of the groups involved, Surrey then signed the travel agent warranty clause contained in the Statement of Supporting Information.

The record affirmatively demonstrates that Surrey sells affinity charter "packages" only to chartering organizations (Tr. Aug. 5, p. 149). And when Mr. Minichiello, Plaintiff's investigator, sought to buy an inexpensive ticket to Las Vegas from Surrey, he was told by Surrey's employees that, except for the sale of a regular airline ticket, there was nothing that Surrey could do for him (Zetlin aff. July 17, p. 2; Tr. Aug. 5, pp. 238-39).

II.

THE PROCEDURAL ISSUES

A. APPELLANTS WERE DENIED THEIR RIGHT TO A HEARING BEFORE A FEDERAL JUDGE.

The hearing on this case commenced before District Court Judge Orrin G. Judd. After hearing the direct testimony of one witness and a portion of the cross examination, he referred this case for the taking of testimony to Magistrate Vincent A. Catoggio.[32] The order of reference[33] stated that ". . . exceptional circumstances exist which require a reference to a Master . . ." under Federal Rule 53(b) and 28 U.S.C. §636, the alleged exceptional circumstances were that ". . . testimony . . . cannot be heard [by Judge Judd] during the intervals of criminal trials of defendants in custody . . .". In short, Judge Judd was faced with a crowded docket which he viewed as an "exceptional circumstance."

1. Rule 53(b) Does Not Authorize The Referral Of This Case By A District Court Judge To A Magistrate.

Rule 53(b) authorized the referral of a case to a master under the following circumstances:

> "A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save any matters of account and of different computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it."

The Supreme Court has held that crowded dockets are not exceptional circumstances within the meaning of Rule 53(b) sufficient to deprive parties of their right to be heard by a district court judge. *La Buy* v. *Howes Leather Company,* 352 U.S. 249 (1957). There, it was alleged that

---

[32] Objection to this referral was made by the government (Tr. July 5, pp. 126-127) and overruled (Tr. July 5, pp. 127-128). Subsequently, defendants objected again before the magistrate; they were also overruled (Tr. July 25, p. 5).

[33] J.A. 1.

congestion of the court calendar and the voluminous accounting which would be entailed in that antitrust proceeding were sufficient grounds for referral by a district court judge to a master. The Supreme Court ruled that only in the most extreme cases should such a referral be permitted and that court congestion or complexity of the issues did not constitute "exceptional circumstances" under Rule 53(b).

The reasons for limiting referrals to the most extraordinary cases were set forth in *Wedding* v. *Wingo,* 483 F.2d 1131 (6th Cir. 1973), aff'd 94 S. Ct. 2482 (1974). In that case a referral was made to a magistrate and subsequently the district court judge heard a sound recording of the testimony taken before that magistrate. The Circuit Court found this procedure inadequate, stating:

> "Listening to a sound recording of the testimony of a witness does not permit a judge to see and observe the demeanor of witnesses and make credibility determinations therefrom.
>
> Furthermore, it must be noted that an essential ingredient of a hearing before a Judge without a jury is the opportunity afforded to the Judge for questioning of witnesses. By his questioning of witnesses the Judge can clarify matters of evidence which are unclear; he can rule on objections made by the parties; and in the interest of justice he can make sure that both parties have had a fair hearing. By seeing and hearing the witnesses he will be in a much better position to make credibility determinations." (*Id.* at 1137).

In *Ingram* v. *Richardson,* 471 F.2d 1268 (6th Cir. 1972), the 6th Circuit held:

> "Crowded court calendars may be a problem in the U.S. District Court for the Eastern District of Kentucky. Reference of cases to magistrates, however, is not the proper solution of the problem. The proper solution of a crowded docket rests with the Congress . . ." (*Id.* at 1271).

Consequently, Rule 53(b) was not an appropriate basis for the District Court's referral in this case.

2. The United States Magistrates Act Of 1968 Does Not Sanction Referral Of This Case To A Magistrate.

The alternative ground offered by the District Court in referring this case to a magistrate was the authority contained in the United States Magistrates Act.[34] That statute conferred jurisdiction upon district courts to refer hearings or trials to magistrates only as to cases under 18 U.S.C. §3146. No other authority to conduct evidentiary proceedings was conferred upon magistrates. Under rules of statutory construction, the principles of *expressio unius est exclusio alterius* would appear to preclude referral to a magistrate of any other type of evidentiary hearing or trial. However, Section 636(b) was drafted including an "enabling" provision which authorizes any district court to establish local rules permitting referral of other duties to magistrates. None of the enumerated duties includes the hearing of evidence, although Section 636(b) does state that the permissible delegations "are not restricted to" the three listed functions. This latter provision is academic in this case because the District Court for the Eastern District of New York has not promulgated local rules which would permit referral to a magistrate of matters other than those specifically enunciated in Section 636(a) and to other types of proceedings not relevant here (See Local Rule 25.1).

However, no court has held that a magistrate may be substituted for an Article III district judge to hear evidence in a civil case arising under a federal statute.[35] To the contrary, as the Supreme Court held in *Wedding* v. *Wingo, supra,* "... the legislative history of the subsection [Section 636(b)(3)] compels the conclusion that Congress made a deliberate choice to preclude district courts from

---

[34] 28 U.S.C. § 631 *et seq.*

[35] *Proffit* v. *Ciccone,* 371 F .Supp. 282 (W.D. Mo., 1973), aff'd 484 F.2d 1322 (8th Cir. 1973) where local rules of the district court authorized assignment of specific additional duties to magistrates. To the same effect see *Bridwell* v. *Ciccone,* 490 F.2d 310 (1973).

assigning magistrates the duty to hold evidentiary hearings." (Id. at 2849).[36]

3. Appellants Were Prejudiced By The Deprivation Of Their Right To Be Heard Before The District Court Judge Who Decreed The Injunction.

We do not believe that Appellants must demonstrate they were prejudiced in any specific request by denial of their rights to a hearing before an Article III judge. However, specific prejudice can be demonstrated. This is not to suggest that the magistrate did not perform his duties properly. Indeed, after hearing the evidence he determined that no injunction should issue.

However, the decision-maker, the District Court judge, did not hear the evidence. He decided an injunction should issue. He also made an erroneous finding of fact regarding Appellant Carefree despite the availability of the testimonial transcript.[37] Numerous disputes of fact are contained in the record, e.g., whether the alleged unlawful contracts were cured by subsequent legal contracts; whether the efforts of Appellants to prevent irregularities were sufficient to demonstrate good faith adequate to deflect Plaintiff's application for a preliminary injunction; whether the injunction would in fact destroy Appellants' business, etc.

Had the District Court Judge heard the evidence he would have been far better equipped to make a determination than by reading a "cold" transcript. He could have asked questions to clarify the record. He could have determined that defendant Eastern Sportsman's Club had no inclusive tour programs, rather than finding to the contrary. (J.A. 28).[38] He would not have been compelled to rely upon the capsulization of 750 pages of transcript and

---

[36] Also see *Noorlander* v. *Ciccone*, 489 F.2d 642, 648 (8th Cir. 1973); *TPO, Incorporated* v. *McMillen*, 460 F.2d 348 (7th Cir. 1972).

[37] See discussion on p. 42 *infra.*

[38] A review of the filings at the Civil Aeronautics Board reveals that Eastern Sportsman's Club has never filed an inclusive tour program.

hundreds of pages of affidavits into a four-page analysis of the facts by the Magistrate.

Appellants were entitled to a hearing before the judge who was to decide their futures. They did not receive it.

B. THE INTENTIONAL MISJOINDER OF APPELLANTS BY THE GOVERNMENT WAS PREJUDICIAL TO A FAIR HEARING.

The government intentionally joined fourteen companies and nineteen individual defendants in this action. All of the entities were unrelated and all of the alleged unlawful acts of said defendants were unrelated. This misjoinder was effected to cast the same dark cloud over all. This is demonstrated by the government's memorandum in support of its motion for a preliminary injunction: "The affidavits on file in this case paint a dark picture of the operation by these defendants of an extensive and plainly illegal black market in air transportation." CAB Memorandum, June 19, 1974, Page 11.

The misjoinder of the various defendants by plaintiff was not inadvertent, but deliberate. It was done to depict a large scale program of aviation violations by a group of defendants acting in unison by improperly combining in a single proceeding isolated instances of wholly unrelated acts in such a manner as to create a false impact of alleged cumulative violations by large numbers of defendants.

This Circuit has most recently considered the permissible limits to joinder of defendants. In *Nassau County Association of Insurance Agents* v. *Aetna Life and Casualty Co.*, 497 F.2d 1151 (1974), plaintiff brought a single proceeding against 164 separate defendants charging each with violation of the same federal antitrust statute. There, as here, no claim of conspiracy or other concerted action was alleged among the various defendants in a matter involving thousands of unrelated and separate insurance transactions which had no common nucleus other than the fact that each defendant was engaged in the insurance business.

In holding joinder impermissible, the Second Circuit said:

> "Here there has been no showing of a right to relief arising from the same transaction or series of transactions. No allegation of conspiracy or other concert of action has been asserted. No connection at all between the practices engaged in by each of the 164 defendants has been alleged. Their actions as charged were separate and unrelated, with terminations occuring at different times for different reasons with regard to different agents." 497 F.2d at 1154.

The fact that the defendants herein are engaged in the same line of business will not render permissible an otherwise improper joinder where it appears that the activities of each defendant are separate and distinct and wholly unrelated and do not involve any joint and several liability on their part. *Standard* v. *Tennessee Valley Authority,* 18 F.R.D. 152, 154 (N.D. Tenn. 1955).

It is no answer that severance of the misjoined parties and consolidation under Rule 42(a) was an available alternative which would have cured plaintiff's misjoinder. The same considerations of prejudice which taint a misjoinder also forbid a prejudicial consolidation. *Tiernan* v. *Westext Transport,* 295 F. Supp. 1251 (D.C. R.I., 1969); *Mays* v. *Liberty Mutual Insurance Co.,* 35 F.R.D. 234 (D.C. Pa. 1964).

The deliberateness of the misjoinder is indisputable. Magistrate Catoggio recognized it in the following language:

> "By joining together a large number of defendants and by relating in bulky affidavits with exhibits attached a considerable amount of hearsay, CAB has spread a heavy veil of suspicion over all of the defendants collectively as a group." (J.A. 14-15).

Earlier he had admonished the government on the same score:

> "That is the trouble with this whole case, Mr. Battocchi, because something happened to Surrey you are trying to hang it on Farragut." (Tr. 324).

However, conscious as the Magistrate may have been of the prejudicial effect of the misjoinder, he succumbed to it inadvertently. Thus he stated:

"The Danger To The Public"

> "Substantial reason exists to believe that the plaintiff has brought to light herein a situation which presents a real threat of serious danger and damage to that segment of the American public which is mislead into travelling by air on what are commonly called charter flights coupled with package deals arranged by the defendants *or those conducting operations comparable to those of these defendants . . .*[39]
>
> * * * * * * *
>
> Thus ample reason exists to suspect that flagrant and widespread violations of the law designed to protect the American public have been committed *in the recent past* by 'package tour companies' who insist *as the defendants* do, that they are not subject to the Civil Aeronautics Law or the Jurisdiction of the Civil Aeronautics Board. There is little if any evidence that these practices have ceased or even abated to any appreciable extent." (J.A. 12-13) (emphasis supplied)[40]

None of these comments relate to Appellants' conduct. Yet, they were placed in the same cauldron with other defendants.

The District Court Judge was also misled by the misjoinder. In his Opinion he attributed evidence elicited against defendant Gil International to Appellant Carefree (J.A. 44-45).[41] Moreover, he treated Appellants Surrey International and Ernie Pike Associates and defendant Gil International as a "group" (J.A. p. 49). This was done despite the record evidence that these entities were separately owned and controlled and were not acting in concert. Indeed, not even Plaintiff maintained that they were acting in concert, although, to be sure, they did transact business at arms length.

---

[39] The record contains no evidence as to *these* Appellants to substantiate this generality.

[40] *Ibid.*

[41] See Tr. July 18, pp. 76 *et seq.*

Plaintiff attempted to taint each defendant with the conduct of others. Apparently, it succeeded only too well.

C. PLAINTIFF INDULGED IN "JUDGE SHOPPING" IN VIOLATION OF LOCAL RULE 2 TO APPELLANTS' DETRIMENT.

Under ordinary circumstances, the District Court Judge in this case would have been selected at random pursuant to Rule 2 of the "Individual Assignment and Calendar Rules" of the United States District Court for the Eastern District of New York. However, the "information sheet" accompanying the Complaint denominated this case as "related" to *CAB* v. *Aeromatic, supra.*

Under Rule 3, related cases may be assigned out of random order to the same judge. Rule 3 defines a related case as one ". . . when because of similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of the time of the whole court is likely to result if the cases are assigned to the same judge."

This case is not related to *Aeromatic.* First, the defendants are different. Second, none of them acted in concert with the defendants in *Aeromatic.* Third, the facts are different and did not arise out of the same transactions. Fourth, while the legal issues may be somewhat similar, they are hardly the same. Moreover, the substantive legal issues in *Aeromatic* have never been determined and probably never will be, since the defendants therein have ceased doing business. Under these circumstances it can hardly be contended that a "substantial saving of the time of the whole court" is likely to result from assigning this case to the same judge.

The district court rebuts Appellants' allegation of misassignment by stating that a party has no right to determine the manner in which his case is assigned, citing *U.S.* v. *Keane,* 375 F. Supp. 1201, 1204 (N.D. Ill. 1974). (J.A. 61). In *Keane* the local rules provide for the random assignment of judges; however, they also established exceptional procedures for protracted, difficult, or widely publicized cases, whereby an Executive Committee could assign

a case to a judge not selected at random. Here, there is no such extraordinary procedure.

Appellants merely request that the district court abide by its own rules—rules designed to prevent the "judge shopping" in which Plaintiff has engaged. These local rules have the force and effect of law and are binding upon the court which promulgated them until they are appropriately changed. *Woods Construction Co.* v. *Atlas Chemical Industries*, 337 F.2d 888 (10th Cir. 1964).

The non-random selection of the District Court Judge here is not an academic issue. Appellants were prejudiced because, due to the crowded calendar of the judge picked by Plaintiff, Appellants were denied a hearing before an Article III judge. Had the judge assignment been made at random, this result could have been avoided.

Further prejudice was suffered because, inevitably, the district court judge would mentally associate this case with *Aeromatic*. He stated "The evidence of certain general business practices of the defendants are largely undisputed,[42] a situation basically similar to that described by the Court of Appeals in the *Aeromatic* case." (J.A. 66). However, this is not an accurate characterization of this Court's decision. It never found any facts, and a trial on the facts had not been held at the time this Court ruled. Instead, this Court merely reiterated the substance of the CAB's allegations. 489 F.2d at 251. Nevertheless, the Judge associated the unproved allegations in *Aeromatic* with the disputed facts here.[43]

CONCLUSION

The preliminary injunction is plainly unlawful and inequitable. Yet, its enforcement will drive Appellants out of business with consequent serious injury to the American

---

[42] This conclusion is inaccurate, as Appellants have vigorously insisted that their general business practices are not reflected in the isolated and unauthorized alleged violations.

[43] Should this case be remanded, Appellants respectfully invite this Court's attention to *O'Shea* v. *U.S.*, 491 F.2d 774, 778-780 (1st Cir. 1974), where the Court analyzed in depth the considerations in assigning a case on remand where the district court judge has not heard the evidence.

traveling public. At stake is $17,000,000 in airline revenue and the travel plans of 60,000 persons.

For all of the foregoing reasons, Appellants respectfully request this Court to reverse the decision of the court below.

Respectfully submitted,

HOWARD S. BOROS
MARK PESTRONK
BOROS & GAROFALO, P.C.
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036
202/296-3766

Attorneys for Appellants

December 13, 1974

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of December, 1974 served the foregoing brief on Appellee by causing copies thereof to be mailed postage prepaid to these persons:

Neil H. Koslowe
Attorney, Civil Division
Department of Justice
Washington, D.C. 20530

and

James W. Tello
Bureau of Enforcement
Civil Aeronautics Board
Washington, D.C. 20428

/s/ SUZANNE GOULD
Suzanne Gould

STATUTORY APPENDIX

STATUTORY APPENDIX

The relevant provisions of the Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C. 1301 *et seq.*) are:

TITLE I—GENERAL PROVISIONS

DECLARATION OF POLICY: THE BOARD

Sec. 102 [72 Stat. 740, 49 U.S.C. 1302] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

* * * * * * * * * *

RATES FOR CARRIAGE OF PERSONS AND PROPERTY

Carrier's Duty to Provide Service, Rates, and Divisions

Sec. 404 [Stat. 760, 49 U.S.C. 1374] (a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and point rates, fares, and charges, and just and reasonable classifications, rules regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

Discrimination

(b) No air carrier of foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, description of traffic in air transportation to any unjust discrimination or any undue or reasonable prejudice or disadvantage in any respect whatsoever.

PART 207—CHARTER TRIPS AND SPECIAL SERVICES

SUBPART B—PROVISIONS RELATING TO PRO RATA CHARTERS

§ 207.20 Applicability of subpart. This subpart sets forth the special rules applicable to pro rata charters, both on-route and off-route.

Requirements Relating to Air Carriers

§ 207.21 Solicitation and formation of a chartering group. (a) A carrier shall not engage, directly or indirectly, in

any solicitation of individuals (through personal contact, advertising, or otherwise) as distinguished from the solicitation of an organization for a charter trip, except after a charter contract has been signed.

(b) A carrier shall not employ, directly or indirectly, any person for the purpose of organizing and assembling members of any organization, club, or other entity into a group to make the charter flight, except after a charter contract has been signed.

§ 207.22 Pretrip notification and charter contract. (a) Upon a charter flight date being reserved by the carrier or its agent, the carrier shall provide the prospective charterer with a copy of this Part 207.[1] The charter contract shall include a provision that the charterer, and any agent thereof, shall only act with regard to the charter in a manner consistent with this part and that the charterer shall within due time submit to the carrier such information as specified in § 207.45. The carrier shall also require that the charterer and any travel agent involved shall furnish it at least 30 days prior to departure of the first flight the statements of supporting information required in §§ 207.47 and 207.31, respectively, unless the charter has been contracted for within 30 days before the date of departure, in which event the statement and attachments shall be filed with the carrier on the date the charter contract is executed. In the event of a substitution of carriers, the carrier with whom the statements and attachments have been filed may forward them to the substitute carrier, in which case new statements need not be executed.

(b) The carrier shall attach to its copy of the charter contract a certification by an officer of the chartering organization, or other qualified person, authorizing the person who executes the contract to do so on behalf of the chartering organization.[2] If the carrier executes a charter contract within 15 days of the flight date, the carrier shall require the person who executes the contract on behalf of the charterer to certify as to whether or not a contract for the flight has been canceled by another carrier because the

chartering organization was found to be ineligible under the regulations. The carrier shall also notify the Board within 5 days after the contract has been executed, that its execution took place within 15 days of flight date. Where the certification discloses, or the carrier has reason to believe, that a contract for the flight has been canceled by another carrier, the notification to the Board shall also state that the carrier has made an independent inquiry and has satisfied itself that such cancellation was not caused by the ineligibility of the chartering organization. If a charter contract is for the return flight of a one-way charter by the same charter organization, a copy of the passenger list (§ 207.45) of the outbound charter shall be attached to the charter contract.

§ 207.23 Agent's commission. The carrier shall not pay its agent a commission or any other benefits, directly or indirectly, in excess of 5 percent of the total charter price as set forth in the carrier's charter tariff on file with the Board, or more than the commission related to charter flights paid to an agent by a carrier certificated to render regular service on the same route, whichever is greater. The carrier shall not pay any commission whatsoever to an agent if the agent receives a commission from the charterer for the same service.

§ 207.24 Statement of Supporting Information. Prior to performing a charter flight, the carrier shall execute, and require the travel agent (if any) and the charterer to execute, the Statement of Supporting Information attached hereto and made a part hereof. If a charter contract covers more than one charter flight, only one statement need be filed: *Provided, however.* That separate financial data (see item 13 of statement) shall be filed for each one-way or round-trip flight. The carrier shall require the charterer to annex to the statement copies of all announcements of the charterer in connection with the charter issued after the contract is signed.

§ 207.26 Air carrier to identify enplanements. The air carrier shall make reasonable efforts to verify the identity

of all enplaning charter participants, and the documentary source of such verification shall be noted on the passenger list: *Provided however,* That in the case of international flights the identity of each enplaning charter participant shall be verified by means of his passport or, if there be none, by means of any other travel identity document, and the passport number or travel identity document number shall be entered on the passenger list.

Requirements Relating to Travel Agents

§ 207.30 Prohibition against double compensation. A travel agent may not receive a commission from both the direct air carrier and the charterer for the same service.

§207.31 Statement of Supporting Information. Travel agents shall execute, and furnish to air carriers, section A of part II of the Statement of Supporting Information attached hereto and made a part hereof, at such times as required by the carrier to afford it due time for review thereof.

Requirements Relating to Chartering Organization

§ 207.40 Solicitation of charter participants. (a) As used in this section, "solicitation of the general public" means:

(1) A solicitation going beyond the bona fide members of an organization (and their immediate families). This includes air transportation services offered by an air carrier under circumstances in which the services are advertised in mass media, whether or not the advertisement is addressed to members of a specific organization, and regardless of who places or pays for the advertising. Mass media shall be deemed to include radio and television, and newspapers and magazines. Advertising in such media as newsletters or periodicals of membership organizations, industrial plant newsletters, college radio stations, and college newspapers shall not be considered advertising in mass media to the extent that;

(i) The advertising is placed in a medium of communication circulated mainly to members of an organization that would be eligible to obtain charter service, and

(ii) The advertising states that the charter is open only to members of the organization referred to in subdivision (i) of this subparagraph, or only to members of a subgroup thereof. In this context, a subgroup shall be any group with membership drawn primarily from members of the organization referred to in subdivision (i) of this subparagraph: *Provided,* That this paragraph shall not be construed as prohibiting air carrier advertising which offers charter services to bona fide organizations, without reference to a particular organization or flight.

(2) The solicitation, without limitation, of the members of an organization so constituted as to case of admission to membership, and nature of membership, as to be in substance more in the nature of a segment of the public than a private entity.

(b) Members of the charter group may be solicited only from among the bona fide members of an organization, club, or other entity, and their immediate families, and may not be brought together by means of a solicitation of the general public. "Bona fide members" means those members of a charter organization who (1) have not joined the organization merely to participate in the charter as the result of solicitation of the general public; and (2) are members for a minimum of 6 months prior to the starting flight date. The requirement in subparagraph (2) of this paragraph is not applicable to—

(i) Students and employees of a single school, and immediate families thereof; or

(ii) Employees of a single Government agency, industrial plant, or mercantile establishment, and immediate families thereof.

(c) Solicitation of, as well as participation by, members of an organization with respect to charter flights shall extend only to the organization, or the particular chapter or unit thereof, which signs the charter agreement with the air carrier as the charterer.

(d) A charterer shall not advertise or otherwise solicit its members for any charter until a charter contract has been signed: *Provided, however,* That this prohibition shall not extend to oral inquiries or internal mailings directed to members to determine interest in a charter flight or charter program so long as no fixed price for air transportation is held out. After a charter contract is signed, copies of solicitation material shall be furnished the carrier at the same time it is distributed to members.

§ 207.41 Passengers on charter flights. Only bona fide members of the charterer, and their immediate families, may participate as passengers on a charter flight, and the participants must be members of the specific organization or chapter which authorized the charter. The charterer must maintain a central membership list, available for inspection by the carrier or Board representative, which shows the date each person became a member.[3] Where four or more round-trip flights per calendar year are conducted on behalf of a chartering organization by a carrier or carriers, intermingling between flights or reforming of planeload groups, or less than planeload groups (see § 207.11(c)), shall not be permitted, and each group must move as a unit in both directions, except as provided in § 207.14.

§ 207.42 Participation of immediate families in charter flights. (a) The immediate family of any bona fide member of a charter organization may participate in a charter flight.

(b) "Immediate family" means only the following persons who are living in the household of a member of a charter organization, namely, the spouse, dependent children, and parents, of such member.

§ 207.47 Statement of Supporting Information. Charterers shall execute and file with the air carrier section B of part II of the Statement of Supporting Information attached hereto and made a part hereof at such time as required by the carrier to afford it due time for review thereof.

Statement of Supporting Information [1]

Part I—To be completed by air carrier for each single entity, mixed, or pro rata charter. (Where more than one round-trip flight is to be performed under the charter contract, clearly indicate applicability of answers.)

1. Name of transporting carrier: _____

_____

2. Commencement date(s) of proposed flight(s): _____

_____

(a) Going _____

(b) Returning _____

3. Points to be included in proposed flight(s): _____

_____

(a) From _____ to _____

(b) Returning from _____
to _____

(c) Other stops required by charter: _____

_____

4. (a) Type of aircraft to be used: _____

_____

(b) Seating capacity: _____

(c) Number of persons to be transported: _____

5. (a) Total charter price: _____

(b) Does the charter price conform to tariff on file with the Board? _____

(c) If pro rata or mixed charter, explain construction of charter price in relation to tariff on file with the Board. (In case of mileage tariff, show mileage for each segment involved and indicate whether segment is live or ferry)

_____

[1] This must be retained by the air carrier for 2 years pursuant to the requirements of Part 249, but open to Board inspection, and to be filed with the Board on demand.

6. (a) Has the carrier paid, or does it contemplate payment of any commissions, direct or indirect, in connection with the proposed flight? Yes [ ] No [ ]

(b) If "yes" give names and addresses of such recipients and indicate the amount paid or payable to each recipient. If any commission to a travel agent exceeds 5 percent of the total charter price, attach a statement justifying the higher amount under this regulation. ----------

---

7. (a) Will the carrier or any affiliate provide any services or perform any functions in addition to the actual air transportation? Yes [ ] No [ ]

(b) If "yes" describe services or functions: ----------

---

8. Name and address of charterer: ----------

---

9. If charter is single entity, indicate purpose of flight:

---

10. On what date was the charter contract executed?

---

11. If the charter is pro rata, has a copy of Part 207 of the Civil Aeronautics Board's Economic Regulations been mailed to or delivered to the prospective charterer? Yes [ ] No [ ]

Part II—To be completed for pro rata or mixed charters only.

Section A—To be supplied by travel agent, or where none, by the air carrier or an affiliate under its control where either of the latter performs or provides any travel agency function or service (excluding air transportation sales but including land tour arrangements).

1. What specific services have been or will be provided by agent on a group basis? ----------

---

---

2. What specific services have been or will be provided by agent to individual participants in the proposed charter?

---

3. Has the agent, or to his knowledge, have any of his principals, officers, directors, associates or employees compensated any members of the chartering organization in relation either to the proposed charter flight or any land tour? Yes [ ] No [ ]

4. Does the agent have any financial interest in any organization rendering services to the chartering organization? Yes [ ] No [ ] If answer is "yes" explain:

Warranty [2]

I, _____ represent and
(Name)

warrant that I have acted with regard to this charter operation (except to the extent fully and specifically explained in Part II, Section A) and will act with regard to such operation in a manner consistent with Part 207 of the Board's Economic Regulations.

(Date)	(Signature and address of travel agent or, if none, of authorized official of air carrier where such carrier or an affiliate under its control performs any travel agency function or service (excluding air transportation sales but including land tour arrangements).)

Section B—To be supplied by charterer:

1. Description of chartering organization, including its objectives and purposes: _____

---

2. What activities are sponsored by the chartering organization?

---

3. When was the organization founded?

---

4. Qualification or requirements for membership in organization and membership fee, if any: ---

---

5. Has there been any reference to prospective charter flights in soliciting new members for the charter organization? Yes [ ] No [ ]

6. State where a list of members is available for inspection ---

---

7. Attach list of prospective passengers (including "standbys" and one-way passengers designated as such), showing for each: (a) Name, address, and telephone number; (b) Relationship of such person to chartering organization, i. e., member, spouse, dependent child, parent or "special" (a person whose proposed participation in the charter flight was permitted by the Board pursuant to request for waiver); (c) If such person is related to a member who is not a prospective passenger, the member's name, address, and telephone number; and (d) Date member joined or last renewed a lapsed membership. (Note: This is a list of prospective passengers and does not necessarily have to represent the passengers actually to be carried. The list is to be amended, if passengers are dropped or added before flights and the certification required by § 207.45 must be attached to the list.)

8. What are requirements for participation in charter?

---

9. How were prospective participants for charter solicited (attach any solicitation material)? ---

---

10. Will there be any participants in the charter flight other than (1) members of the chartering organization or (2) spouse, dependent children, and parents of a member of the chartering group residing in the same household with the member? Yes [ ] No [ ]

11. Will there be any members of the chartering organization participating in the charter who will have been members of the organization for a period of less than 6 months prior to flight date. Yes [ ] No [ ] If answer is "yes", give names of participants who will not have been members for 6 months: _____

_____

12. If there is any intermediary involved in the charter, other than the travel agent whose participation is described in Part II, Section A, submit name, address, remuneration, and scope of activity: _____

_____

_____

13. Estimated receipts:

_____ × _____ =
(Pro rata charge) (Number of passengers)

$ _____
(Estimated receipts from charter)

Estimated receipts from other sources, if any:

_____

Explain: _____

_____

(a) Total receipts: $_____

Estimated expenditures, including aircraft charter (separately itemize air transportation, land tour, and administrative expenses):

Item	*Amount*	*Payable to*
_____	_____	_____
_____	_____	_____
_____	_____	_____

(b) Total expenditures: $_____

Explain any differences between (a) and (b): _____

_____

14. Are any of the expenses included in Item 13 above, to be paid to any members of the chartering organization? Yes [ ] No [ ] If "yes" state how much, to whom and for what services: _____

_____

15. Is any member of the chartering organization to receive any compensation or benefit directly or indirectly from the air carrier, the travel agent, or any organization providing services in relation to the air or land portion of the tip? Yes [ ] No [ ] If "yes" explain fully:

_____

_____

16. Will any person in the group (except children under 2 years) be transported without charge? Yes [ ] No [ ]

17. Will charter costs be divided equally among charter participants, except to the extent that a lesser charge is made for children under 12 years old? Yes [ ] No [ ]

18. Separately state for the outbound and inbound flights the number of one-way passengers anticipated to be transported in each direction: _____

_____

_____

19. If four or more round trips are contracted for, will each group move as a unit in both directions? Yes [ ] No [ ]

20. If charters have been performed for organization during past 5 years, give dates and name of carrier performing charters: _____

_____

21. Has a copy of Part 207 "Charter Trips and Special Services" of the Economic Regulations of the Civil Aeronautics Board been received by the charterer? Yes [ ] No [ ]

22. Attach copies of all announcements of the chartering organization in connection with the charter issued after the charter contract is signed.

Warranty of Charter [4]

I, _____ and
(Name)

_____ represent
(Name)

and warrant that the charterer has acted with regard to this charter operation (except to the extent fully and specifically explained in Part II, Section B), and will act with regard to such operation, in a manner cosistent with Part 207 of the Board's Economic Regulations. I (we) further represent and warrant that the charterer has not offered charter flights simultaneously with the solicitation of membership in the chartering organization in any mass media advertising or notice or through direct mailing or public posters. I (we) further represent and warrant that all charter participants have been informed of eligibility and cost requirements of Part 207 and that a flight may be canceled if ineligible participants are included.

_____
(Date)

_____
(Signature—person within organization in charge of charter arrangements)

_____

(Signature and title of officer. This should be the chief officer of the chartering organization except in the case of a school charter, in which case the warranty must be by school official not directly involved in charter.)

Warranty of Air Carrier

To the best of my knowledge and belief all the information presented in this statement, including but not limited to, those parts warranted by the charterer and the

travel agent, is true and correct. I represent and warrant that the carrier has acted with regard to this charter operation (except to the extent fully and specifically explained in this statement or any attachment thereto) and will act with regard to such operation in a manner consistent with Part 207 of the Board's Economic Regulations.

(Date)

(Signature and title of authorized official of air carrier)